Burtman Iron Works, Inc. ***and*** **Shopmen's Local Union No. 501 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO.** Case 1–CA–36724

November 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On October 29, 1999, Administrative Law Judge Jerry M. Hermele issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, the Respondent filed an answering brief to the General Counsel's exceptions, and the General Counsel and the Charging Party filed answering briefs to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified and set forth in full below.[2]

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act as alleged, we shall order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully failed and refused to execute the collective-bargaining agreement it had reached with the Union, we shall order the Respondent to execute the agreement and to make employees whole, with interest, for any losses of earnings and benefits from the effective date of the contract. Such amounts, if any, shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682, 683 1970), enfd. 444 F.2d 502 (5th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In the event that the agreement provides for contributions to pension and benefit funds, the Respondent shall make all contractually-required contributions to these funds that they have failed to make since the effective date of the bargaining agreement, including any additional amounts due to the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Further, the Respondent shall reimburse unit employees for any expenses ensuing from their failure to make the required contributions as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Burtman Iron Works, Inc., Readville, Massachusetts, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing from October 22, 1998, to execute the collective-bargaining agreement it reached with the Union on August 13, 1998.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the collective-bargaining agreement reached by the parties on August 13, 1998.

(b) Make employees whole, with interest, in the manner set forth in the remedy section of this decision, from the effective date of the contract for any losses of earnings and benefits because of the Respondent's failure to execute that collective-bargaining agreement on October 22, 1998.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Readville, Massachusetts, copies of the at-

[1] In accord with the General Counsel's exception we shall modify par. 3 of the judge's conclusions of law to read:

> The Respondent violated Sec. 8(a)(1) and (5) of the Act by failing, since October 22, 1998, to execute the collective-bargaining agreement it reached with the Charging Party Union on August 13, 1998.

[2] We shall modify the recommended Order to conform to the judge's findings and with the Board's standard remedial language. We shall also add a remedy section.

[3] To the extent that an employee has made personal contributions to a fund that are accepted in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

tached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since October 22, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to execute the collective-bargaining agreement we reached with the Union on August 13, 1998.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL execute the collective-bargaining agreement we reached with the Union on August 13, 1998.

WE WILL make our employees whole, with interest, from the effective date of the collective-bargaining agreement, for any losses of earnings and benefits because of our failure and refusal to execute the collective-bargaining agreement we reached with the Union.

BURTMAN IRON WORKS, INC.

Joseph F. Griffin, Esq., for the General Counsel.

Harold N. Mack, Esq. (Phillips, Gerstein, Holber, & Channen), of Haverhill, Massachusetts, for the Respondent.

Marc H. Rifkind, Esq. (Slevin & Hart P.C.), of Washington, D.C., for the Union.

DECISION1

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. This case involves a dispute between the Respondent, Burtman Iron Works, Inc. (Burtman), and the Union, Shopmen's Local Union No. 501 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO, over a new collective-bargaining agreement following the old agreement's expiration on July 15, 1998. In a February 23, 1999 complaint, the General Counsel alleged that the Respondent failed to sign the new contract, after agreeing on all the material terms, thus violating Section 8(a)(1) and (5) of the National Labor Relations Act. In a March 5, 1999 answer, the Respondent claimed that it failed to sign because of a disagreement over the "standard pension benefit."

This case was tried on August 18, 1999, in Boston, Massachusetts, during which the General Counsel called two witnesses and the Respondent called one witness. Briefs were then filed by the Respondent, the General Counsel,2 and the Union,3 on October 1, October 5, and October 6, respectively.

II. FINDINGS OF FACT

Burtman is a material handling manufacturer located in suburban Boston (Readville), with annual interstate sales and receipts of over $50,000 (G.C. Ex. 1(c)). The Company has had a long-term collective-bargaining relationship with the Union. At the height of its operation, it had 200 employees but that number shrank following its bankruptcy filing in November 1995, following the last collective-bargaining agreement which was signed on July 16, 1995. A Chapter 11 plan was then approved for the Company in 1997, from which it has not yet been discharged, and the number of employees shrank to about 40 in mid-1999 (Tr. 146–48, 151). The Union's jurisdiction covers all of Massachusetts and there are four other companies whose employees it represents (Tr. 27).

In 1983, Burtman's employees became covered by the National Shopmen Pension Fund (the Fund), which provided for their retirement, which event usually occurred after 25 years of service. Over 100 union locals, across the United States, participate in the Fund. However, Local 501 is the only local whose members did not receive the "standard level of benefits," which typically yields $160 a month more in retirement benefits per employee (Tr. 21, 25–26, 38, 53). Local 501's secretary-treasurer, and chief contract negotiator, David Mortimer, was aware of this shortfall (Tr. 15, 19, 31).

[4] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Upon any publication of this decision by the National Labor Relations Board, "stylistic" changes may have been made by the Board's Executive Secretary to the original decision of the Presiding Judge.

[2] On October 7, the General Counsel filed a motion to correct its brief, to include two missing lines. The unopposed motion will be granted.

[3] The Union was not represented by counsel at trial. On September 20, 1999, however, the Union's lawyer sent a letter to the General Counsel, with a copy to the presiding judge, giving notice that it "will be appearing. . . ." The brief then followed. No party filed any responsive pleading.

The 1995 contract between the Company and the Union was set to expire on July 15, 1998. This contract provided that the Company would pay 71 cents per hour into the Fund for each hour of pay paid to each covered employee (G.C. Exh. 2). Mortimer drafted a new contract in mid-1998 which proposed, among other things, that the Company's contribution rate for the Fund be increased to 81 cents per hour (G.C. Exh. 3). At the first negotiating session on June 30, 1998, Mortimer asked Philip Goodman and Harold Mack, the Company's treasurer and lawyer, respectively, whether the Company would agree to provide the standard benefit. This was the first time that Goodman learned that the employees were receiving a lower benefit under the Fund. Goodman said that the Company was still in precarious financial shape. Then, both Goodman and Mack asked Mortimer if agreeing to provide the standard level would cause any additional cost to the Company. Mortimer replied that there would be no additional cost to the Company. So, Goodman and Mack said they would consider agreeing to the standard level, provided there was no additional cost (R. Exh. 1; Tr. 18–19, 21, 40, 45–46, 135, 145–46, 149–50).

The next bargaining session was July 7, 1998. Mortimer was on the verge of retirement but he attended this session along with his successor in the negotiations, Anthony Rosaci, the district representative for the Union's International wing (Tr. 15, 22, 35, 37, 56–57). Rosaci then presented the following separate document to the Respondent:

> Collective Bargaining Agreement Proposal:
> Pensions
>
> The Employer shall enter into an agreement with the Trustees of the National Shopmen Pension Fund (Trustees) in which the Employer expressly agrees and consents to allow the Trustees to increase benefit accruals for its Employees who participate in the National Shopmen Pension Plan (Plan) to the Plan's standard rates for all years of credited pension service (i.e., both before and after January 1, 1984). The agreement shall provide for such increase for all Employees who work one or more hours of Covered Employment under the Plan on or after July 1, 1998.

(GC Exh. 4; Tr. 107–11). Mack reiterated the Respondent's support for the standard benefit level provided there was no additional cost to the Company. However, the Respondent rejected the Union's proposal for an increase in the Respondent's current 71 cents per hour contribution rate (Tr. 60–61). During the next session, on July 16, 1998, the Respondent presented a written "final offer," containing a 2 percent wage increase for each of the next three years, plus the following provision:

> Effective the first year of the agreement the "Standard Pension Benefit" available under the National Shopmen Pension Fund will be applicable to bargaining unit employees provided there is no additional cost to the Company and provided they meet the eligibility requirements. . . .

(GC Exh. 5; Tr. 63–64). Goodman thought it was odd that the employees could get higher benefits without any additional cost borne by the Company. Moreover, he was particularly concerned about cost increases because of the Company's precarious financial condition. Yet Rosaci repeated that the change would cost the Company nothing (Tr. 148, 152–53).

For reasons that had nothing to do with the pension fund, the employees rejected the Company's proposal, on July 23, 1998. One day later, Goodman sweetened the Company's offer with, among other things, higher wage increases. The employees voted to accept these changes on July 24 (Tr. 65–68). As negotiations continued, the Respondent suggested the following language regarding the pension fund:

> [t]he Employer shall not be deemed as a guarantor of any increase in benefit accruals, nor shall said increase in benefit accruals affect the Employer's Contribution Rate, as provided in Section 14A(D) of the Collective Bargaining Agreement.

(GC Exh. 7). In a conversation with Mack, Rosaci objected to this language. So, stating that it "got into areas of ERISA and employer withdrawal liability," Rosaci proposed eliminating the first clause, thus leaving only the following:

> Said increase in benefit accruals shall not affect the Employer's Contribution Rate as otherwise provided in Section 14A(D) of the Collective Bargaining Agreement.

Rosaci also suggested that Mack speak with the Fund's lawyer if Mark had any questions (GC Exh. 8; Tr. 74–79, 120–23).

On August 13, 1998, Goodman and Rosaci signed a "Settlement Agreement" constituting "the understanding of the parties as to the collective-bargaining agreement in effect for the period July 16, 1998 through July 15, 2001." The agreement provided, among other things, that:

> 5. The Employer shall enter into an agreement with the Trustees of the National Shopmen Pension Fund (Trustees) in which the Employer expressly agrees and consents to allow the Trustees to increase benefit accruals for its Employees who participate in the National Shopmen Pension Plan ("Plan") to the Plan's standard rates for all years of credit pension service (i.e., both before and after January 1, 1984). The agreement shall provide for such increase in benefit accruals for all Employees to whom the Collective Bargaining Agreement is applicable and who work one or more hours of Covered Employment under the Plan on or after July 1, 1998.
>
> Said increase in benefit accruals shall not affect the Employer's Contribution Rate as otherwise provided in Section 14A(D) of the Collective Bargaining Agreement.

(GC Exh. 9). And on August 24 and 31, 1998, Goodman and the National Shopmen Pension Fund, respectively, signed an agreement, which provided, in pertinent part:

> 1. Pursuant to Section 2.02(b) of the Merger Agreement between the Trustees of National Shopmen Pension Fund and Shopmen Iron Workers Pension Fund, the Employer hereby expressly agrees and consents to allow the NSPF Trustees to increase benefit accruals for its Employees who participate in the Plan to the Plan's standard rates for all years of credited pension service.
>
> 2. The Trustees agree that they shall increase the benefit accruals, subject to paragraphs 3, for the active employees of the Employer covered by the Plan to the standard rate(s) provided by the Plan.
>
> 3. Increases in rates of benefit accruals shall be made only with respect to employees of the Employer to whom the Collective Bargaining Agreement is applicable and who work one or more hours of Covered Employment under the Plan with the Employer on or after July 1, 1998.
>
> 4. This Agreement shall not obligate the Employer to increase the contribution rate provided for in the applicable Collective Bargaining Agreement between the Employer and Shopmen Local Union 501.

(GC Exh. 12).

Sometime in late August or September 1998, Rosaci drafted the new collective bargaining agreement (GC Exh. 13). Rosaci sent it to the International Union for approval as to form, and to the Respondent for signature (Tr. 86–87). Before he could sign, Goodman received a phone call, sometime in October 1998, from Matt Sisson, of American Architectural, a Massachusetts employer which was also negotiating a contract with Local 501. Sisson told Goodman that the National Shopmen Pension Fund was substantially underfunded and that Burtman might incur substantial liability if it withdrew from the Fund. So, Goodman called Mack and another lawyer specializing in pension law. Because Goodman was concerned that the Fund might terminate, he sent the following letter to the Union on October 22, 1998 (Tr. 136–38, 154–56, 166):

> In the course of our recent contract negotiations, Local 501 made certain representations regarding its proposal that future retirees be eligible for standard benefits as provided by the National Shopmen's Pension Fund. As a result of questions that have arisen regarding these representations, Burtman Iron Works, Inc. must put on hold its tentative agreement regarding said proposal.
>
> Subject to further analysis the company must also decline to execute the collective bargaining agreement recently forwarded to me.

(GC Exh. 15). However, to date, the Respondent has complied with all other changes in the unsigned contract, including wage increases to the employees (Tr. 94). On November 13, 1998, Goodman wrote to Rosaci requesting certain information about the Fund, including the Respondent's actual or estimated withdrawal liability based on the standard and non-standard benefit levels (R. Exh. 2). A representative for the Fund responded on December 1, 1998 that there would be a $1500 charge for such estimates (R. Exh. 3). Finally, on February 25, 1999, Goodman wrote Rosaci that the Union should pay for this estimate because "this is requested information that Local Union 501 is obliged to supply us under the National Labor Relations Act . . ." (R. Exh. 4). The Company never received these estimates (Tr. 179).

III. ANALYSIS

The General Counsel alleges that Goodman's refusal to sign the collective bargaining agreement violated Section 8(a)(1) and (5) of the Act. But the Respondent counters that its willingness to sign "was conditional on there being no costs of any nature. . . ." And when Goodman learned at the eleventh hour of a potential cost regarding withdrawal liability, he refused to sign.

The Respondent's argument, however, is untenable. First, while it is clear that the Respondent was genuinely worried throughout the contract negotiations about incurring additional costs by agreeing to the standard benefits provision, the written documents effectuating that pension change were only conditioned on the maintenance of the Respondent's 71 cents per hour contribution rate to the Fund. Specifically, the August 13, 1998 Settlement Agreement between the Respondent and the Union, which embodied the parties' agreement on the yet-to-be-drafted collective bargaining agreement, said nothing about future withdrawal liability (GC Exh. 9). Likewise, the August 1998 agreement signed by the Respondent and the Fund was silent about any conditions regarding any future withdrawal liability to be incurred by Burtman (GC Exh. 12). Also, the collective-bargaining agreement, signed by the Union and sent to the Respondent, was likewise silent on this matter (GC Exh. 13).4 Moreover, a draft proposal containing the condition "there is no additional cost to the Company" was rejected by the Union on July 23, and on August 13 Goodman acceded to the Union's suggestion deleting language that "the Employer shall not be deemed as a guarantor of any increase in benefit accruals. . ." (GC Exhs. 7,8). Thus, the written documents pertaining to the parties' actual agreement on the pension issue do not establish any conditional approval of the standard pension benefit by the Respondent other than maintaining the Respondent's per hour contribution rate. Second, even if the parties' negotiations could be interpreted as establishing any broader condition, there is simply no credible evidence that there would in fact be any additional cost to Burtman based on future withdrawal liability. Rather, all that is present in this case is a rumor, transmitted by another employer to Goodman, that the fund was underfunded and that Burtman might incur liability if it withdrew from the fund. But this rumor was purely speculative, without any supporting evidence. Further, that fund never provided any estimate on the question of withdrawal liability. Thus, "no useful purpose is served by conjuring up abstruse concepts" such as phantom conditions in the collective-bargaining agreement. *R.E.C. Corp.*, 277 NLRB 1107, 1111 (1985). And because there was a meeting of the minds on all substantive issues and material terms of the contract, as evidenced by the parties' signing of the August 1998 settlement agreement, the presiding judge concludes that a valid collective-bargaining agreement was indeed reached in August 1998. See *Intermountain Rural Electric Assn*., 309 NLRB 1189 (1992).

The presiding judge also rejects the Respondent's next argument that the Union "misrepresented . . . the absence of costs" to the Respondent during contract negotiations. Suffice it to say that there is not one whit of evidence that union negotiators Mortimer or Rosaci misled Goodman or Mack on the pension issue at all. Indeed, in late July or early August, Rosaci invited Mack to speak with the fund's lawyer about any concerns relative to ERISA or withdrawal liability, an invitation Mack apparently never accepted. Finally, although not argued by the Respondent, this is also not a case where a unilateral mistake by one party should void the contract. Compare *Carpenters Local 405*, 328 NLRB 788 (1999) (rescission is a remedy reserved for instances where the mistake is "so obvious").

In sum, it is well-settled that when parties reach agreement as to all the terms of a collective-bargaining agreement, each party is required by Section 8(d) of the Act to execute that contract when it is reduced to writing. Moreover, a failure to do so constitutes a violation of Section 8(a)(5) of the Act. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). Here, notwithstanding the Respondent's generalized concern about increasing its costs during its current sojourn in bankruptcy, the Respondent and the Union agreed on an increase in the employees' pension benefits, provided that the Respondent's per hour contribution rate into the pension fund not be increased. The parties did not condition this increase in benefits on anything else, including any future withdrawal liability to be incurred by the Respondent. Thus, the Respondent's failure to sign the contract violates Section 8(a)(1) and (5) of the Act. Accordingly, the Respondent will be ordered to sign it and to take other ancillary remedial action.

CONCLUSIONS OF LAW

1. The Respondent, Burtman Iron Works, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Shopmen's Local Union No. 501 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act by failing, since October 22, 1998, to execute the July 16, 1998, contract negotiated between the Union and the Respondent.

4. The unfair labor practice of the Respondent, described in paragraph 3, above, affects commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

---

[4] The Respondent suggests in its brief that Goodman might not have received GC Exh. 13—the collective-bargaining agreement—from the Union, thus explaining why he didn't sign it. The presiding judge does not take this argument seriously. The parties apparently exchanged documents before trial and Goodman was definitely presented with GC Exh. 13 at trial. He still did not sign the agreement.